UNITED STATES v. **BOYLAN** et al.

No. 167

Circuit Court of Appeals, Second Circuit

265 F. 165; 1920 U.S. App. LEXIS 1388

March 3, 1920

PRIOR HISTORY: [**1]

In Error to the District Court of the United States for the Northern District of New York.

OPINIONBY: MANTON

OPINION: [*165] Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The United States government instituted this action for the purpose of ejecting the defendants below from 32 acres of land situated in the city of Oneida, Madison county, N.Y. The action is brought on behalf of certain Oneida Indians, under the claim that they are the wards of the federal government, and that the government has legal capacity to intervene in their behalf and eject from the said premises the defendants below, who claim title. Their title depends upon the following alleged conveyances:

[*166] On April 1, 1885, several deeds of conveyance were made by some of the original twenty-three Indians mentioned in the treaty of 1842 made by the state of New York with the Oneida Indians. Isaac Honyost, a descendant of Margaret Charles, mentioned as one of the tribe in the treaty of 1842, gave Philander Spalding a mortgage to secure the payment of $1,250 on a portion of the premises here in question. This mortgage was recorded April 2, 1888. On April 4, 1888, it was assigned [**2] by Spalding to Patrick **Boylan** and duly recorded. Shortly prior to July 3, 1897, Patrick **Boylan** died leaving a last will and testament, which was duly probated on July 8, 1897, and letters testamentary were issued to Joseph Beal, his sole executor named in the will. He duly qualified. The will gave the mortgage to **Boylan's** wife. In March, 1905, the executor commenced a statutory foreclosure of said mortgage by advertisement and, in addition, publishing and posting a copy of the notice of the sale at the office of the Hotel Brunswick at Oneida, N.Y. This notice was served on some of the Oneida Indians, but not all. The affidavits in that proceeding do not disclose who was then in occupation of the premises. The names of the persons served are given, but their relationship to the tribe is not clear. The sale actually took place on July 15, 1905, and the property was sold for $1,250 on the bid of Michael Burke of Oneida, N.Y. On August 29, 1905, Burke and his wife conveyed the premises by quitclaim deed to the defendant below, Julia **Boylan.** Philander Spalding and wife conveyed the same premises on July 10, 1906, by quitclaim deed, to Julia **Boylan.**

Julia **Boylan** commenced an [**3] action in the Supreme Court of the state of New York for the partition of the property here in question, and this by filing the summons and complaint and notice of pendency of action. In this proceeding Mary George, Noah George, Henry George, Maggie, wife of

Henry George, William Honyost, Mrs. William Honyost, wife of William Honyost, and Isaac Honyost, were made defendants. Chapman Schenandoah and his wife were subsequently made parties. The defendants entered an appearance through their attorneys. Such proceedings were taken that a partition of said property was had, the interests of the various defendants were determined and fixed, and the report of the referee appointed was rejected by the Supreme Court justice when the proceedings reached him on a motion for confirmation. This, however, was subsequently reversed by the Appellate Division of the Supreme Court of the state, and a final judgment was entered confirming the same, and the referee was directed to execute to the purchaser a conveyance of the property sold. **Boylan** v. George, 133 App. Div. 514, 117 N.Y. Supp. 573. After deducting the costs and allowances incident to this litigation, and awarding to the plaintiff such [**4] moneys as she was entitled to in those proceedings, a deficiency judgment was awarded against the defendants for $6.05. Thus the interest of the Oneida Indians in this property was alleged to be extinguished. At the time these proceedings took place, the Oneida Indians were in possession and occupied them until they were ejected through the proceedings in the Supreme Court. By virtue of a writ of assistance, issued by that court, they [*167] were forcefully ejected and removed against their protest. The referee appointed in the state Supreme Court, partitioned the property as follows:

(1) That julia **Boylan** was seized and entitled in fee simple to an undivided thirty-one fortieths of same. Her title, if any, came through such statutory foreclosure and quitclaim deeds mentioned.

(2) Mary George was seized and entitled in fee simple to an undivided three-fortieths of same.

(3) Henry George was seized and entitled in fee simple to an undivided one-fortieth of same, subject to the inchoate right of dower of his wife, Maggie George.

(4) That William Honyost was seized and entitled in fee simple to an undivided one-fortieth of same, subject to the inchoate dower right of [**5] his wife.

(5) That Chapman Schenandoah was entitled to an undivided four-fortieths of same, subject to the inchoate right of dower of his wife.

(6) That Isaac Honyost had no interest therein.

In the proceedings to partition the property, neither the United States, nor the state of New York, nor the Commissioner of Indian Affairs, nor the Oneida Indians were made parties to the suit. The lower court has found as a fact that the Oneida Tribe of Indians were actually in possession and occupation of the lands in question, together with the adjoining lands, which form a part of the original Oneida Indian reservation. In May, 1842, a treaty was made between the first and second Christian parties of the Oneida Indians and the state of New York. At this time the lands in question, together with the other adjoining lands, were set apart by this treaty to the Oneida Indians then remaining on the reservation. It is on behalf of these Indians that this action is brought. The Oneida Indians were natives of the soil lying within the limits of the state of New York when it was organized. In 1784 the United States government entered into a treaty (7 Stat. 44) with the Six Nations of Indians [**6] residing within the state of New York, and one of these was the Oneidas. That treaty provided in article 2:

"The United States acknowledge the lands reserved to the [Indians] * * * in their respective treaties with the state of New York, and called their reservation, to be their property, and the United States will never claim the same, nor disturb them * * * nor their Indian friends residing thereon and united with them in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

Some of the Indians moved from the reservation in New York state to Green Bay, Wis. These immigrations took place in 1840 and 1841, under the regulations and supervision of the federal government. The right was given to the Indians as a tribe to dispose of their lands in the state of New York, if they decided to move to Green Bay and there accept other lands allotted to them. After this, the Indians remaining held a single and undivided tract reserved out of the original Oneida reservation. It was in 1842, when the commissioners of the land office of the state of New York, [**7] then constituting the Indian department of the state, arranged that the state purchase such portion of the reservation as represented the equitable share in the proportion to the number of Indians who migrated in [*168] 1842 to Green Bay, Wis. The result of this was the treaty of 1842, herein referred to, in which all of the remaining Indians joined. Some 1,110 acres were surveyed and divided into 19 lots. Article 1 of the treaty provided as follows: That the Oneidas --

"do hereby grant, bargain, sell, cede, and surrender to the people of the state of New York, all the right, title, estate, and interest of the said party of the first part in and to all that part of their reservation not heretofore released by said party of the first part to the party of the second part, known and distinguished as lots numbered 1, 3, 4, 5, 7, 10, and 15 by Nathan Burchard's map and certificates of survey, containing 371.34 acres."

Articles 2 to 5, inclusive, provide for sales of such lands so ceded, and for payments to the Indians named in Schedule A, known as "Emigrating Party." Article 6 provided:

"It is hereby stipulated and agreed that those members of the first and second Christian [**8] parties of the Oneida Indians as are included in Schedule A hereby release, quitclaim and forever renounce to the said Indians named in Schedule B and to those who may succeed them in their right, title and interest, claim or demand, whatsoever in and to the said portion of land so set apart, described, reserved and allotted for those of the first and second Christian parties of said Indians who do not at present intend to migrate, enrolled in Schedule B as aforesaid, all and the residue of the said reservation not now nor heretofore ceded to the people of the said state, known and distinguished as lots numbered two, six, eight, nine, eleven, twelve, thirteen, fourteen, sixteen, seventeen, eighteen and nineteen as surveyed and allotted by Nathan Burchard. Reference is here had to the said map and field book of the said Nathan Burchard, and to be filed in the offices of the secretary of state and surveyor general; when copies thereof are indorsed thereon and duly authenticated by him, they shall for ever be deemed the metes and bounds of the lands ceded and those reserved. And those reserved shall be deemed the common property of all the individuals included in Schedule B."

Article [**9] 7 provided that the Indians should surrender the lands, and, if they belong to those named in Schedule A, such Indians should, on payment, immediately migrate and go beyond New York; but, if they belonged to Schedule B, then such persons were given possession of the lands so ceded. Thus the Indians in the reservation were divided into two classes. The lots numbered seventeen and nineteen, which are involved in this litigation, came under Schedule B. Schedule B gave the names of the "tenants in common and owners of lots 17 and 19," and these did not migrate. The following are those named as tenants in common and owners:

"Aaron Cooper, Hannah Cooper, Dollay Cooper, Margaret Cooper, Susan Cooper, Betsy Cooper, Jenney Cooper, Moses Cooper, Moses Charles, Caty Charles, Margaret Charles, Susan Charles, Mary Charles, Elizabeth Cornelius, Daniel Cornelius, Roderic Cornelius, Jenney Cornelius Job, alias Authony Antone, Cornelius Antone, Thomas Antone, Mary Antone, Mary Antone, and Susan Antone."

No specific lot or parcel was attempted to be allotted or set off by the treaty to any individual Indian as his or her separate share. Under article 6 of the treaty, the migrating party, referred [**10] to in Schedule A, quitclaimed and renounced to the home party, named in Schedule B, and to those who

might succeed them in interest, all of the rights in the lots reserved to them. The treaty provides for the succession in interest of their successors, and not "heirs and assigns." [*169] Both parties named in the treaty joined in ceding said lands, which were to be sold by the state and the proceeds of which were to go to the migrating party. There is nothing in the treaty which indicates a partition of lands embraced in lots 17 and 19 as between the 23 individual Indians, nor did the treaty mention or contemplate any future partition between individuals. The state Constitution (article 1, section 15) provides that no purchase or contract of sale of land in this state made with the Indians shall be valid, unless made under the authority and with the consent of the Legislature. This was attempted by the state Legislature. Chapter 185, Laws 1843. That enactment provides as follows:

"Section 1. The Oneida Indians owning lands in the counties of Oneida and Medison are hereby authorized to hold their lands in severalty in conformity to the surveys, partitions and schedules [**11] annexed to and accompanying the treaties made with the said Indians by the people of this state in the year one thousand eight hundred and forty-two and now on file in the office of the secretary of state, and the lots so partitioned and designated by said survey to said Indians shall be deemed to be in lieu of all claims and interest of the said Indians in and to all other lands and property in the Oneida reservation. * * *

"Sec. 2. The Governor shall appoint a superintendent of the Oneida Indians. * * *

"Sec. 3. It shall be lawful for the said superintendent of the Oneida Indians, upon application made to him for that purpose, by any Indian or Indians owning lands as aforesaid, to sell and convey such lands to the person or persons so applying. * * * A deed of an Indian shall be valid to convey the title of himself, his wife and minor children, and every deed executed by virtue of this act shall be acknowledged by the grantor before the first judge of Madison county, and the consent of the superintendent shall be indorsed thereon, and when so executed and acknowledged and certified, shall be recorded in the county in which said land shall lie, with the same effect as other [**12] deeds.

"Sec. 5. The said superintendent shall, with the consent of a majority of the chiefs and head men of the said Indians, sell and convey the above mentioned lots of land, held according to Indian usages, and sanctioned by treaties with them on the part of this state, as the common property of all the Oneidas who did not cede their lands to the people of this state previous to the treaty made with them, March 8, 1841, for a fair price unto any purchaser or purchasers, by requiring from them cash payments. And the conveyances shall be made, executed, and acknowledged by the state superintendent; and the consent of the chiefs and head men in council shall also be acknowledged in the presence of an officer duly qualified to take acknowledgments of deeds. * * *

"Sec. 6. The deeds and conveyances made as aforesaid shall convey all the right, title and interest of the said Indians or Indian whose lands shall have been conveyed as aforesaid of, in and to the same, and shall vest in the purchaser or purchasers, his or their heirs and assigns, forever, an absolute estate of inheritance in fee simple."

Later the state Legislature passed an act (chapter 420 of the Laws of 1849), [**13] for the benefit of Indians, by the terms of which it was provided, among other things, that as to all tribes or bands of Indians who occupied Indian reservations within the state or hold lands therein as a common property, such tribes or bands may, by the acts of their respective Indian governments, divide such common lands into tracts or lots and distribute or partition the same in parts thereof, quantity and quality relatively considered, to and amongst the individuals [*170] or families of such tribes or bands, respectively, so that the same may be held in severalty and in fee simple, according to the laws of the state; but no lands occupied and improved by any Indian according to the laws, usage, or custom of the nation shall be set off to any person other than the occupant or his or her family. It was further provided that, in the event